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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THOMAS E. KEPNER, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 244.

SECUNDINO MENDEZONA Y MENDEZONA,
plaintiff in error,
v.
THE UNITED STATES. } No. 584.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE DEFENDANT IN ERROR.

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STATEMENT OF THE CASE.

Thomas E. Kepner, plaintiff in error, a member of the Manila bar, was tried by the court of first instance of the city of Manila in November, 1901, on the charge of *estafa* (embezzlement of the funds of a client) and acquitted.

[a] An examination of the record in this case (pp. 29 and 30) will disclose that the only issue raised therein is the so-called "jeopardy question." In view of this fact, and the further fact that this issue is discussed at length herein, under the Third Assignment of Error, it is deemed unnecessary to make a statement of the facts and file a separate argument in said case No. 584.

Under the law now in force in the Philippine Islands, which gives the government as well as the accused the right of appeal from final judgments of the courts of first instance in criminal cases, the government appealed the case and the supreme court reversed the judgment of the lower court, sentencing plaintiff in error to one year eight months and twenty-one days' imprisonment, together with suspension from the office of attorney at law.

The case is here on writ of error. The assignments of error are as follows:

> First. That the court erred in entertaining an appeal by the United States from the judgment of acquittal rendered by the trial court, because the defendant and respondent was never legally tried in said trial court by a jury as provided by Article III, section 2, amendment 6, of the Constitution of the United States.
>
> Second. That the court erred in overruling the motion of defendant and respondent to dismiss the appeal, because such appeal is prohibited by the Constitution of the United States, amendment 5, which provides that no person shall "be subject, for the same offense, to be twice put in jeopardy."
>
> Third. That the court erred in overruling the motion of defendant and respondent to dismiss said appeal, because said appeal was prohibited by the act of Congress of July 1, 1902, entitled "An act temporarily to provide for the administration of the affairs of

civil government in the Philippine Islands, and for other purposes," which provides that "no person for the same offense shall be twice put in jeopardy of punishment"

First and Second Assignments of Error.

The first and second assignments of error are based upon the proposition that the Constitution of the United States, in its entirety, has been in full force and effect in the Philippine Islands since the date of the ratification of the treaty of Paris, and hence the provisions guaranteeing the right of trial by jury and the provision prohibiting double jeopardy (as the term is understood at common law) have existed in the islands since that date.

This court has recently held in the so-called Insular Cases that exactly the contrary of the foregoing proposition is the law. It held in those cases that the provisions of the Constitution do not of their own force attach to newly acquired territory immediately upon the date of acquisition; that power to extend the provisions of the Constitution to the territories rests in Congress; that notwithstanding the fact that there are certain prohibitions contained in the Constitution relating to fundamental rights which go to the very root of the power of Congress to act, at all times, in all places, and under all circumstances, yet there are other limitations contained in that instrument, not absolute in their nature, relating to such matters as methods of procedure and forms of judicial

trials, which do not restrict Congress in the exercise of its power to create local governments and make needful rules and regulations for the Territories of the United States.

This position is identical with that taken by Chief Justice Marshall in the case of *American Insurance Co.* v. *Canter* (26 U. S. Rep., 542), and by Mr. Webster, who argued the case before him. In that case it will be observed that the "Great Chief Justice," without devoting any time to the discussion of the question of the source of the power, announced with great clearness and force that the existence of such authority in Congress could not be questioned.[a]

In view of the foregoing decisions, the only practical question left for determination in cases

[a] In the meantime, Florida continues to be a territory of the United States; governed by virtue of that clause in the Constitution which empowers Congress "to make all needful rules and regulations respecting the territory, or other property, belonging to the United States."

Perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned.

* * * * *

These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the General Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the Territories of the United States. (26 U. S. Rep., 542, 543, 546.)

like the one at bar is: What are those constitutional guarantees which Congress may, in its discretion, extend to or withhold from territory which has not been incorporated into the United States? Fortunately for the determination of this case, the court has answered this question, in the recent case of *Hawaii* v. *Mankichi*, as follows:

> We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case[a] are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well being.

The power of Congress to provide such modes of trial and methods of procedure as, in its judgment, are best adapted to the needs of the people of the territory, is here clearly recognized. Such power was also recognized in the case of Ross, petitioner, 140 U. S., 453.

In the light of these decisions, it must be deemed that the propositions contained in the first and second assignments of error have been finally ad-

[a] Common law trial by jury and indictment by grand jury.

judicated, and we shall not consume the time of the court with further discussion of them.

Third Assignment of Error.

The sole question raised in this case, in our opinion, is whether the provision of the Code of Criminal Procedure now in force in the Philippine Islands, which gives the government, as well as the accused, the right of appeal from judgments of the trial court in criminal cases, is repealed by the act of Congress of July 1, 1902, entitled "An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes," which provides that no person "for the same offense shall be twice put in jeopardy of punishment."

General Order No. 58, of the United States military government in the Philippine Islands, issued April 23, 1900, has never been repealed and is at the present time the criminal code of procedure of the islands. Sections 43 and 44 of said general order are as follows:

> SEC. 43. From all final judgments of the courts of first instance of similar jurisdiction and in all cases in which the law now provides for appeals from said courts, an appeal may be taken to the supreme court as hereinafter prescribed. Appeals shall also lie from final judgments of justices of the peace in criminal cases to the courts of the next superior grade, and the decisions

of the latter thereon shall be final and conclusive, except in cases involving the validity or constitutionality of a statute, wherein appeal may be made to the supreme court.

SEC. 44. Either party may appeal from a final judgment or from an order made after judgment affecting the substantial rights of the appellant, or in any case now permitted by law. The United States may also appeal from a judgment for the defendant rendered on a demurrer to an information or complaint and from an order dismissing a complaint or information.

By this general order the right of appeal in criminal cases, given to the government by the Spanish criminal law, was expressly continued. It is impossible to doubt that, in accordance with the law before cited, the government possessed the right of appeal from all verdicts of acquittal in criminal cases up to the enactment of the act of Congress of July 1, 1902, providing for civil government in the Philippine Islands. This statement can be controverted only on the supposition that the right of appeal in question constitutes double jeopardy and that the constitutional prohibition against double jeopardy was, *proprio vigore*, in force in the Philippine Islands from the date of the exchange of ratifications of the treaty of Paris, which would be in exact opposition to the decision of the Supreme Court of the United States in the recent cases just referred to.

This being so, it must follow that if such right of appeal by the Government in criminal cases does not now exist in the islands, it is solely because of the provisions contained in the act of Congress of July 1, 1902. Said act contains two provisions relating to criminal procedure in the islands, which must be considered together in determining the effect of said act upon the Government's right of appeal in criminal cases. These two provisions are as follows:

> SEC. 5, par. 3. That no person shall be held to answer for a criminal offense without due process of law; and no person for the same offense shall be twice put in jeopardy of punishment nor shall be compelled in any criminal case to be a witness against himself.
>
> SEC. 9, first sentence. That the supreme court and the courts of first instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided and such additional jurisdiction as shall hereafter be prescribed by the government of said islands, subject to the power of said government to change the practice and method of procedure.

The contention of the plaintiff in error is that the provision first cited takes from the government all right of appeal from judgments of acquittal in criminal cases, on the theory that the effect of such appeals is to put the party accused twice in jeopardy for the same offense.

The contention of the defendant in error, on the other hand, is that it can not fairly be supposed that Congress, by the insertion of a general clause, intended to sweep away the entire existing system of criminal procedure in the islands, but as section 9 of said act contained simply a repetition of the law giving the supreme court jurisdiction to hear appeals on behalf of the government from judgments of acquittal in criminal cases, so it must be held that Congress, by the clause in question (sec. 5, par. 3), intended to simply reaffirm the principle of jeopardy which exists both in the Roman law and in the common-law systems of jurisprudence, and give it an application in harmony with the system of procedure in force in the islands at the date of the passage of the act.

We desire, at the outset, to call the attention of the court especially to the fact that the principle that a person shall not be twice put in jeopardy for the same offense is as firmly embedded in the Spanish law as it is in the law in the United States. The difference in the two rules, which is one of application merely, arises from the difference between the common law and the civil law conceptions of what constitutes a trial. Broadly speaking, under the American law jeopardy ends with the conclusion of a trial by a jury. Under the Spanish system jeopardy ends when the case has been heard by the supreme court on appeal and the latter has rendered a final judgment. Under the Spanish system there is no jury trial and the

judgment of the trial court is but little more than advisory. It may be modified, set aside, or reversed on appeal. It is not an uncommon occurrence for the supreme court to increase the punishment of persons who have been convicted by the lower court, and it often convicts persons who have been acquitted by the trial court. But when this is done the jeopardy ends. There is no reviewing the case after the supreme court has passed upon it. Until recently cases went to the supreme court as a matter of law, no appeal being necessary. But this has been modified to the extent of making the judgments of the courts of first instance final, unless an appeal is taken by the attorney-general or the accused within twenty days. It is thus seen that, under the law, there is no real finality of judgment until both tribunals have passed upon the case. *The review of the case by the supreme court is a part of one continuous trial.*

It must also be borne in mind that section 9 of the before-mentioned act provides for the retention by the supreme court and courts of first instance in the Philippine Islands of their existing jurisdiction. This provision is clearly intended to include criminal as well as civil, appellate as well as original. The expression "jurisdiction as heretofore provided" must refer to the laws on this subject existing before the passage of this act, as there is no prior provision in the act itself relative to such jurisdiction.

The facts just recited, namely, that the law against double jeopardy existed in the Philippine Islands before the passage of the act of Congress and that section 9 of said act expressly states that the courts in the Philippines "shall possess and exercise jurisdiction as heretofore provided," are significant when considered in connection with the rules of interpretation which must govern in this case.

For the purpose of avoiding confusion in the application of the rules of interpretation, let us, for the moment, eliminate from our consideration the fact that the law of criminal procedure in the Philippines now under discussion emanated from the Spanish Government and the military branch of the Government of the United States, and suppose, for the sake of the argument, that said law is there by virtue of an act of Congress.

Let us suppose that on July 1, 1901, Congress legislated for the Philippine Islands and included in the act the following provisions:

> 1. That no person shall be twice put in jeopardy of punishment for the same offense; but jeopardy shall not be deemed to have ended until the supreme court has reviewed the case on appeal and rendered final judgment thereon: *Provided, however*, If the attorney-general fails to perfect an appeal from the judgment of the trial court in accordance with the provisions of the law, jeopardy shall be deemed to have ended

upon the rendition of final judgment by the trial court.

2. The Government shall have the right, in all criminal cases, to appeal from all judgments of acquittal by the court of first instance, and the supreme court of the Philippine Islands shall have jurisdiction to hear and determine such appeals.

This is a fair statement of the law as it existed in the Philippine Islands at the time of the passage of the Philippine government act on July 1, 1902.

Now, let us place alongside the foregoing the following provisions of the act of July 1, 1902.

1. No person, for the same offense, shall be twice put in jeopardy of punishment.

2. The supreme court of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided, and such additional jurisdiction as shall hereafter be prescribed by the government of said islands.

This narrows the issue to one simply of statutory construction: Did Congress, by the second act, mean to repeal the first? Was it the intention of Congress to sweep away, by the use of a single general clause, the entire system of procedure then existing in the islands without substituting another in its place? The first act provides for a separate, distinct, and complete method of trial in criminal cases. It provides for trial by judges instead of trial by juries and contains an application of the rule against double jeopardy consistent

with such a systen of procedure. The second act, after providing in general terms against double jeopardy without any explanation of the intended application of the rule, provides in special terms that an important portion of the original law of procedure shall be continued in force, viz, that the supreme court shall have jurisdiction to hear and determine appeals in criminal cases from the courts of first instance, both on behalf of the government and on behalf of the accused.

Since the act does not in terms provide for a change in the application of the principle of jeopardy, can it be said that it does so by implication? We do not think this proposition can be maintained. It is hardly fair to suppose that Congress intended to abolish an entire system of procedure without evidencing such an intention by the use of a repealing clause or by substituting another system in its place. If it had intended to modifiy the application of the principle of jeopardy as it now exists in the Philippine Islands, and take from the government the right of appeal in criminal cases, it could have accomplished that purpose by appending to the clause that "no person shall be twice put in jeopardy of punishment for the same offense" the words "and the law giving the government the right of appeal from judgments of acquittal by the courts of first instance in criminal cases is hereby repealed." Far from doing this Congress reaffirmed the law, which gave the supreme court the same jurisdiction to hear appeals

from the trial court which it formerly had, and simply provided against double jeopardy.

It will be observed that the two statutes deal with the same subject-matter. That all statutes *in pari materia* are to be considered together goes without saying. It is also needless to call the attention of the court to the familiar and fundamental principle of law that *the legislature is always presumed to have had former statutes before it, to have been acquainted with their judicial construction, and to have passed new statutes on the same subjects with reference thereto.* (*State* v. *Gerhardt*, 33 L. R. A., 313, 322; *Earl of Ailesbury* v. *Patterson*, 1 Doug., 28; *State* v. *Lineberger*, 72 Pa., 241.)

Congress was here dealing with a new and unique subject-matter. It knew that the Philippine Islands were, at the time of the passage of the act, governed under a system of laws separate and distinct from our own; it knew that the principles of the civil law prevailed in all Spanish countries, and that under that system of jurisprudence the right of trial by jury did not exist; it knew that the Spanish law on the subject of jury trial and jeopardy had been reenacted by the military commander in the Philippines. The law on the subject is plain and simple. Congress also knew, or is presumed to have known, that the supreme court in the Philippine Islands had uniformly held,[a] in interpreting the laws in question, that

[a] *D. Juan Garvia* v. *D. Cesar Lopez Garcon*, criminal branch, supreme court of justice, Philippine Islands, September 12, 1900; *United States* v. *D. Mateo Perez*, supreme court, Philippine Islands, April 9, 1902.

jeopardy does not end, in the islands, until the case has been reviewed by the supreme court and final judgment rendered thereon.

That Congress took into consideration the peculiar circumstances surrounding the subject-matter and the particular system of laws in force in the islands is not a mere matter of presumption, but is evidenced by the fact that when it touched upon the subject of criminal procedure it omitted the chief feature of that branch of the law as it exists in common-law countries, viz, the system of trial by jury, thus demonstrating that it meant to conform, as far as possible, to the system of jurisprudence then in force in the islands. The conception of double jeopardy, as it exists in England and the United States, is indissolubly connected with the system of jury trial, and we submit that it is not reasonable to contend that Congress in changing this fundamental rule of procedure did not also mean to change the application of the auxiliary principle of jeopardy. If Congress had extended the system of trial by jury to the Philippines, then the position of plaintiff in error herein would be unassailable, but when he contends that Congress meant to engraft upon a Roman law system of trial by judges the application of a common-law rule against double jeopardy, incident only to the system of trial by jury, and this, too, by the use of a general expression, his position lacks the support of sound reason, as well as of the rules of

statutory construction, and we think is too extravagant to be maintained.

It will be found that all the rules of construction and interpretation support the Government's position herein.

Rules for Construction and Interpretation of Statutes.

The following five generally applied rules for the construction and interpretation of statutes are submitted as furnishing the proper principles to be applied in the construction and interpretation of the act of Congress of July 1, 1902, entitled "An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes," and in determining the effect of said statute upon the right of the Government to appeal from judgments of acquittal in criminal cases.

1. Every statute should be so interpreted and construed as to ascertain and carry into effect the meaning and intent of the legislative body by which said statute has been enacted.

2. If possible, a statute should be so interpreted and construed as to give effect to every provision therein.

3. There is a strong presumption against the repeal by a statute, by implication, of any existing law; there is a presumption against unnecessary change of laws.

4. If two provisions in a statute are inconsistent, the more particular provision will prevail over the more general one.

5. Where two or more provisions contained in the same statute are directly in conflict with one another and can not be brought into harmony by any rule of construction, one or the other of the two following principles must be applied:

(*a*) The provision latest in position will prevail, or

(*b*) The contradictory provisions cancel each other and both are void.

Rule 1.

Every statute should be so interpreted and construed as to ascertain and carry into effect the meaning and intention of the legislative body by which it was enacted.

The object of all interpretation and construction of statutes is to ascertain the meaning and intention of the legislature, to the end that the same may be enforced. If a statute is valid, it is to have effect as the meaning and intent of the lawmaker; the intent is the vital part, the essence of the law. (Black on Interpretation of Laws, section 24; Sutherland on Statutory Construction, section 234.)

This court, in the case of *Hawaii* v. *Mankichi*, discussed at length the canons of statutory interpretation, and its holding in that case, although on a different set of facts, is significant in determin-

ing the question involved in this controversy. The court there said:

> But there is another question underlying this and all other rules for the interpretation of statutes, and that is, What was the intention of the legislature? Without going back to the famous drawing of blood in the streets of Bologna, the books are full of authorities to the effect that the intent of the law-making power will prevail, even against the letter of the statute, or, as tersely expressed by Mr. Justice Swayne in *Smythe* v. *Fiske* (23 Wall., 374, 380), "A thing may be within the letter of a statute and not within its meaning, and within its meaning though not within its letter. The intention of the lawmaker is the law."

The case of *Hawaii* v. *Mankichi* grew out of the joint resolution adopted by Congress July 7, 1898. (30 Stats. L., 78.) This resolution was, in part, as follows:

> The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

The law of Hawaii at that time allowed an accused party to be put on trial upon an indictment not found by a grand jury and to be convicted by

the verdict of nine out of twelve jurors. It was claimed that this was in conflict with the sections of the Constitution which provide that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, and that in all criminal prosecutions the accused shall enjoy the right of speedy and impartial trial by a jury of citizens of the State where the crime shall be committed (fifth and sixth amendments to the Constitution), which jury has been held by the Supreme Court of the United States to be the old common-law jury of twelve men. (*Thompson* v. *Utah*, 170 U. S, 349; *Maxwell* v. *Daw*, 176 U. S., 586.)

In *Hawaii* v. *Mankichi*, however, the majority of this court held that this apparently express prohibition against indictments not found by grand jury and against verdicts of juries by less than a unanimous vote, contained in the Newlands resolution, must yield to the intention of Congress, contrary to their literal words. The reason which led the court to this conclusion as to the intent of Congress was that *it could not be supposed that Congress, by a general expression contained in one of its acts, intended to abolish the existing system of procedure in Hawaii, especially where the act contained no provision for the establishment of any new system of procedure.*

RULE 2.

If possible, a statute should be so interpreted and construed as to give effect to every provision therein.

The foregoing rule also supports the contention of the Government herein. If practicable, effect must be given to all the language employed. Statutes should be so construed, if possible, as to give effect to all their clauses and provisions. (Sutherland on Statutory Construction, section 239; Black on Interpretation of Laws, section 232.)

It was an ancient maxim of the law that "interpretare et concordare legis est optimus interpretande modus," that is, to interpret, and to do it in such a way as to harmonize laws with laws, is the best method of interpretation. (Stouter's case, 8 Coke, 169; 22 L. R. A., 67.)

It is an elementary principle of construction that effect must be given, if practicable, to every word, clause, and sentence of a statute. (*C., C., C. & St. L. R. Co.* v. *Backus*, 18 L. R. A., 729.)

In construing statutes it is well settled by the rules of construction that the prime object is to ascertain and carry out the purpose of the legislature, and in construing statutes the courts *will look to all parts of the same statute*, to other statutes, and to the general principles of law, and assign such meanings to the words of the statute construed as will make them all effective. (*Storms* v. *Stevens*, 104 Indiana, 46; *Hunt* v. *Lake Shore & Mich. South. Ry.*, 112 Indiana, 69.)

If section 9 of the act of Congress of July 1, 1902, is given the meaning which it would have if taken in the sense which its words possess ordinarily and in the sense which the Government maintains it should have, due force can still be given to the provision against double jeopardy. Moreover, if the provision against double jeopardy is held to prohibit the right of appeal by the Government in criminal cases, then part of section 9 must be absolutely disregarded. These two sections can only be harmonized by the construction suggested by the Government and supported by the foregoing rule.

RULE 3.

There is a strong presumption against the repeal by a statute, by implication, of an existing law; there is a presumption against unnecessary change of laws.

Speaking of such presumptions, Maxwell, in his work on Interpretation, second edition, 96, says:

> One of these presumptions is that the legislature does not intend to make any change in the law beyond what it explicitly declares, either in express terms or by unmistakable implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe

> rights, or depart from a general system of law without expressing its intention with irresistible clearness, and to give any such effect to general words simply because, in their widest and perhaps natural sense, they have that meaning, would be to give them a meaning in which they are not really used.

Black, in his Interpretation of Laws, section 52, says:

> It is presumed that the legislature does not intend to make unnecessary changes in the preexisting body of law. The construction of a statute will, therefore, be such as to avoid any change in the prior laws beyond what is necessary to effect the specific purpose of the act in question.

Sutherland on Statutory Construction, section 217, also says:

> The law will not allow the revocation or alteration of a statute by construction when the words may have their proper operation without it.

The court, in *Robinson's case* (131 Mass., 376), said:

> The intention of the legislature in enacting a particular statute is not to be ascertained by interpreting the statute by itself alone and according to the mere literal meaning of its words. Every statute must be construed in connection with the whole system of which it forms a part and in the light of the common law and of previous statutes upon the same subject. And the

legislature is not to be lightly presumed to have intended to reverse the policy of its predecessors, or to introduce a fundamental change in long-established principles of Law.

Manuel v. *Manuel*, 13 Ohio St., 458.
Bear's Adm'r. v. *Bear*, 33 Pa. St., 525.
Thompson v. *Mylne*, 4 La. Ann., 206.
Childs v. *Johnson*, 6 La. Ann., 634.
L. R. A., Vol. 4., p. 309, note.

The following propositions have also been well settled by a long line of decisions:

A construction allowing both acts to stand will be adopted and a later will supersede an earlier law only to the extent that they are irreconcilable.

A repeal by implication is not favored.

The general policy of the law is adverse to repeals by implication.

A statute can only be repealed either by express provision or by necessary implication, and to justify a repeal by implication there should be such a repugnancy in the new law as to lead to the conclusion that the later law abrogated, or was intended to abrogate, the former.

Where no repealing words are inserted in a later act, a strong presumption arises that no repeal was intended.

Hunt v. *Chicago Horse & Dummy Ry. Co.*, 121 Ill., 638.
Plum v. *Lugar*, 8 Cent. Rep., 591.
State v. *Cooper*, 13 Western Rep., 347.
Pac. Ry. Co. v. *Cass*, 53 Mo., 17.

Mc Vey v. *Mc Vey*, 51 Mo., 406.
49 N. J. Law, 557.
114 Indiana, 12.

While a later statute might repeal a former one without express language to that effect, yet it can not be supposed that the legislature in framing a general statute intended to repeal a special statute made necessary by local circumstances.

The legislature is presumed to have legislated with a view to former statutes, to have been acquainted with their judicial construction, and to have enacted new laws with reference thereto.

The policy of the United States has always been against abrupt and sweeping changes in the private law found existing in newly acquired territory. This is shown by its action at the time of the acquisition of Louisiana, of California, and of Hawaii, and it has been its well-settled policy in the Philippine Islands, as evidenced by the general instructions of the President to the United States Philippine Commission, and by its declared intention contained in the act of Congress of July 1, 1902, to continue the prior existing private laws except as abolished or modified by express legislation.

RULE 4.

If two provisions of a statute are inconsistent, the more particular provision will prevail over the more general one. (*Black on Interpretation of Laws, 140.*)

> When a legislative act contains two sets of provisions, one giving specific and precise directions to do a particular thing and the other in general terms prohibiting certain acts which would, in the general sense of the words used, include the particular act before authorized, the general clause does not control or affect the specific enactment.
>
> Sutherland on Statutory Construction, section 158.
>
> *State* v. *Inhabitants of city of Trenton*, 38 N. J. Law, 64.

These interpretations harmonize with the rule that when a general intention is expressed, and also a particular intention which is incompatible with the general one, the particular intention shall be considered an exception to the general one.

> It thus appears that words expressive of a particular intent incompatible with other words expressive of a general intent will be construed to make an exception, so that all parts of the act may have effect. (*Neb. ex rel. Douglas County* v. *Cornell*, 39 L. R. A., 513, 516, 517.)

The various general provisions contained in the Bill of Rights of the Federal Constitution and in the act of July 1, 1902, are broad generalities, the precise limits of which are hard to determine, and which to-day in the United States do not, in all cases, retain the meaning they originally possessed in England; nor have these different provisions

always received the same construction in the different States of the Union. For example, the interpretations given to the declaration against double jeopardy in the States of Connecticut and Illinois are diametrically opposed to each other in certain respects.

Such general legal abstractions can never prevail against direct expressions of legislative will contained in instruments of equal legal force. An express provision in a statute is, of course, unconstitutional where opposed to one of these general prohibitions contained in the Bill of Rights forming part of the Constitution, but this is not the case where the general and specific prohibitions are both contained in the same statute. The rights of personal safety and liberty, guaranteed by the Constitution in general terms and maxims, are for the purpose of maintaining certain substantial rights and not particular forms and methods of procedure. This very question of the relative effect to be given to two provisions of a statute or code, one putting in force new legal principles in general, and the other specifically continuing certain existing legal principles, came before this court in the case of *Hawaii* v. *Mankichi*, and the court characterized the suggestion that the former could prevail over the latter as "*rather fanciful than real.*"

RULE 5.

Where two or more provisions contained in the same statute are directly in conflict with one another and can not be brought into harmony by any rule of construction, one or the other of the two following principles must be applied in the construction of said statute:

(a) *The provision latest in position will prevail; or*

(b) *The contradictory provisions cancel each other and both are void.*

Sutherland on Statutory Construction, section 220.

The proposition that the provision which is latest in position repeals the other has been laid down in a number of cases.

Packer v. *Sunbury R. R. Co.*, 19 Pa. St., 211.

Harrington v. *Rochester*, 10 Wend., 547, 553.

Gibbons v. *Brittenum*, 56 Miss., 232.

Ryan v. *State*, 5 Nebr., 276, 282.

Being later in position, the later provision is deemed the prevailing expression of the legislative will.

This principle is embodied in the Code of California, section 1022 of which is as follows:

> If conflicting provisions are found in different sections of the same chapter or article, the last section prevails unless such construction would be inconsistent.

This rule is to be applied only as a last resort, and is not in every instance of great value. In the present case, however, its effect is to destroy the position of the plaintiff in error. His contention can only be sustained by holding that not only the right to appeal by the Government in criminal cases is contrary to the provision against double jeopardy, but also by holding that section 9 must be rejected in part because contrary to the provision against double jeopardy in section 5. It is not believed by the Government that if a correct interpretation is given to the provision against double jeopardy there is any conflict between sections 5 and 9. If there is, however, it seems necessary to apply one of the two alternatives contained in rule 5. The application of either disposes of the contention of the plaintiff in error. If the first alternative rule is applied, section 9, standing last in the statute, governs; if the second, both fall and the existing law is not altered; the Government would still have the right to appeal under the old law.

The contention of the plaintiff in error is that a provision in the statute, framed in general terms, should be taken as rendering void a later, specific provision in the same statute. For such a position there is absolutely no authority. There is not a single English or American case which can be cited in support thereof.

Position of Plaintiff in Error Considered.

Against the foregoing rules plaintiff in error sets up the following proposition, viz: That the controlling guide in determining the intent with which Congress enacted the law in question must be found in the interpretation which the language, as used in the statute, has received at common law, and the meaning it has in the Constitution of the United States. It is admitted that this proposition is entitled to consideration; it is conceded that if Congress had been legislating for a territory where the laws in existence sprang from the common law, the rule invoked by plaintiff in error would be controlling. But it is emphatically denied that, when Congress is legislating for a territory which has no historical connection with common-law countries and where the Anglo-Saxon inhabitants are almost a negligible quantity—a territory, in short, where it is known that a system of law is in force based upon the Roman law—the foregoing proposition is entitled to more weight than the elemental and common sense rule of law and statutory construction that the legislature, in the enactment of a law, is presumed to have had former laws on the same subject before it, to have been acquainted with their judicial construction, and to have passed new statutes with special reference thereto; in other words, that the legislature is always deemed to have in mind the laws in force

and the special circumstances and conditions surrounding the subject matter of the legislation.

The principle involved in the discussion of this point was brought out and fully discussed in the opinion of this court in the case of *Hurtado* v. *California*. In that case the question involved was, What was meant by the expression in the Constitution "due process of law"? The specific question before the court was whether a conviction upon an information for murder in the first degree and a sentence of death thereon were illegal by virtue of that clause of the fourteenth amendment which prohibits a State from depriving any person of life, liberty, or property without due process of law. Mr. Justice Harlan, in a dissenting opinion, quoting from the decision of this court in *Murray's Lessees* v. *Hoboken Land & Improvement Co.* (18 How., 272), stated the proposition upon which the plaintiff in error here rests his argument, as follows:

> To what principles are we to resort to ascertain whether this process enacted by Congress is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look *to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been*

> *unsuited to their civil and political condition by having been acted on by them* after the settlement of this country.

Following this is a long and able argument in defense of the proposition that "due process of law" as used in the Constitution of the United States with reference to criminal procedure must receive the same interpretation which was given to it at common law.

The majority of the court, however, speaking through Mr. Justice Matthews, said in answer to the foregoing position:

> The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—*suum cuique tribuere*. There is nothing in Magna Charta, rightly construed as a broad charter

of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mold and shape it into new and not less useful forms.

The concessions of Magna Charta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament, so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in *Bonham's case* (8 Rep., 115, 118a), the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

In this country written constitutions were deemed essential to protect the rights and

liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

Restraints that could be fastened upon executive authority with precision and detail might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power; and while in every instance laws that violated express and specific injunctions and prohibitions might, without embarrassment, be judicially declared to be void, yet any general principle or maxim founded on the essential

> nature of law, as a just and reasonable expression of the public will and of government, as instituted by popular consent and for the general good, can only be applied to cases coming clearly within the scope of its spirit and purpose and not to legislative provisions merely establishing forms and modes of attainment. Such regulations, to adopt a sentence of Burke's, "may alter the mode and application, but have no power over the substance of original justice." (Tract on the Popery Laws, 6 Burke's Works, ed. Little & Brown, 323.)

Our contention is, therefore, that the interpretation to be given to the provision against double jeopardy contained in the act of Congress of July 1, 1902, should be in accord with the intention of Congress when that act was passed, and such intent should be gathered from the conditions existing in 1902 in the Philippine Islands rather than from conditions existing in England at the time of the adoption of Magna Charta or in North America at the time of the adoption of the Constitution of the United States, or at the time of the adoption of any of the State constitutions containing this provision against double jeopardy. The court in the case of *Hawaii* v. *Mankichi* held the intention of Congress to be to continue the existing laws in Hawaii, except so far as expressly repealed, and the intention of Congress as to existing law in the Philippine Islands should be considered the same. In enacting the fifth section of the act of Congress

of July 1, 1902, Congress inserted the various important provisions of the Bill of Rights contained in the Constitution of the United States, with two important exceptions, in the general terms in which they are usually stated, probably without actually paying much attention to what their particular effect would be in the Philippines. These general provisions have never had any precise limits placed upon their application, but have meant different things at different times and in different places. In the opinion of the court just cited it was held that their present meaning in the United States is not the same as their original meaning in England.

This court held in the *Hurtado case*, as well as in the case of *Hawaii* v. *Mankichi*, that the object of these provisions was to secure to individuals the general, substantial rights of personal liberty and property, and not a mere formal adherence to certain particular methods of criminal procedure. These provisions are, at best, general. The particular provision against double jeopardy has received widely different constructions in different States of this country. The provision, however, contained in the ninth section of the act of July 1, 1902, as to the continuation of the jurisdiction possessed by the courts of the Philippine Islands, is as specific and certain in its meaning as the English language can make it: "That the supreme court and the courts of first instance of the Philippine Islands shall possess and exercise jurisdiction

as heretofore provided, and such additional jurisdiction as shall hereafter be prescribed by the government of said islands, subject to the power of said government to change the practice and method of procedure." Certainly this language can have but one meaning to any rational mind, and that is, that the existing methods of procedure, criminal as well as civil, appellate as well as original, were to continue in force and effect in the Philippine Islands. This conclusion is rendered irresistible by the fact that no provision is made for any new method of procedure to take the place of the one then in operation. If any part of the existing mode of procedure was repealed, nothing was provided in its place.

Furthermore, the intention of Congress to secure to the Philippine Islands, by section 5 of the act of July 1, 1902, all the substantial rights of Anglo-Saxon liberty, but without giving them the common-law forms of procedure is shown by the omission to provide in that act for jury trials. The whole Anglo-Saxon theory of procedure, criminal and civil, is based upon the provision for trial by jury. The omission of the provision for jury trial renders other principles of common-law procedure inappropriate. Common-law proceedings without jury trial would be like the play of Hamlet with Hamlet left out. In every case where a statute giving the right of appeal to the Government in criminal cases has been declared unconstitutional, the Government attempted to appeal from the

verdict of a jury. The reason underlying the view that the right of appeal by the Government is in conflict with a provision against double jeopardy seems to be this: Under the common law the accused has the right to have his fate determined by a jury. The jury is the supreme authority, and when they have completed their work one jeopardy is over, viz, the jeopardy of conviction by that particular jury. A second jury would involve a second jeopardy, for one jury might convict where another would acquit. There is much soundness in this position; otherwise the State might go on experimenting until it found a jury willing and ready to convict.

All this, however, is inapplicable to the present case. No person or body has a right to render a verdict except the courts. There is no verdict or judgment rendered by a body which then forever passes out of existence. The inferior and superior courts of the Philippine Islands are merely parts of one general judicial system. The connection between these courts is far closer than it possibly can be under a jury system. The proceedings in the upper and lower courts are merely parts of the same judicial trial. The proceeding in the lower court is but one step in the case; the rights of the accused can not be determined therein, either favorably or adversely. *There is but one trial, which cannot be terminated until the decision of the supreme court is finally given, and there is but one*

putting in jeopardy. In the Philippine Islands the supreme court itself renders the verdict; under the common law procedure all the court can do is to order a new trial by a new jury, and in this connection we desire to call the attention of the court especially to the fact that the supreme court in the Philippine Islands has no original or concurrent jurisdiction to hear and try criminal cases in the first instance; its jurisdiction is only appellate; hence there can be no new trial in any proper sense of the term.

"Jeopardy" under the Common Law and Spanish Law Systems.

A comparison of the common law and Spanish law conceptions in this connection may, at first blush, appear to be academic rather than practical. Our purpose, however, is to show that the adoption in the Philippine Islands of the application of the principle as it exists in the Spanish law is not in derogation of any fundamental right guaranteed by the Constitution of the United States, or in violation of any principle of natural justice, because—

First. The principle contained in the doctrine against double jeopardy is identical in both systems, the difference being one of application only.

Second. It will be found upon examination that the Spanish law application of the principle is better supported by reason and justice than the

one found in the common law, and is better calculated to conserve the rights and well-being of the citizens of the Philippine Islands.

The Spanish law application of the principle is based upon the theory that the State has just as much right and just as much interest in having the errors of the trial court corrected by the appellate court as has the accused, and the further proposition that, under the judicial system as it exists in the Philippines, such a procedure results in no injury to the accused.

The common law application of the principle of jeopardy grew out of a state of affairs in England which has had no parallel in the history of this country. The application of the principle as it is found in the common law was a natural and necessary auxiliary of the system of trial by jury and was designed to defeat the corrupt administration of the sovereign, who had come to use the courts for the accomplishment of his own personal ends, rather than for the purposes of justice. The system of trial by jury was of no avail to defeat the aggressions and usurpations of the crown, if the verdict of the twelve men had been committed to the judgment of a pliant judiciary appointed to execute the sovereign will. In this state of things it became necessary to make jeopardy end with the verdict of the jury, and so it was incorporated into the law. From this fact, and from the *dicta* of certain judges, the idea has grown up that a trial ends be-

cause the accused has once been placed in jeopardy.[a] The truth is, the trial was declared to be at an end in order to defeat the purposes of a tyrannical sovereign.

A trial does not end because one has been in jeopardy, but jeopardy ends because there has been a legal and valid trial. The whole proposition turns upon what constitutes a trial, and that is a matter of statute and of judicial interpretation. The conditions out of which the common-law rule sprang having passed away there is no good reason why the rule itself should not yield to modification.

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[a] The rule that a criminal cause once submitted to a jury can not be submitted to another jury may be traced to a *dictum* of Coke. * * * That *dictum* was at most a statement of existing procedure, and, as such, has been repeatedly discredited in a large number of cases; and a rule of procedure in criminal law advanced during the seventeenth century can not be held to dominate the settled principles of jurisprudence in the nineteenth. The administration of criminal law as it formerly prevailed in England has justly been regarded, in some respects, as an object lesson of barbaric codes. Its continuance theoretically unchanged during the wonderful evolution of a system of civil liberty and sound jurisprudence is a marvel, not inexplicable, perhaps, but none the less strange. Judges were compelled to administer a criminal code in many ways sharply antagonistic to the system of civil liberty and justice which legislature and courts were slowly developing. It is not surprising that under such limitations they should have been acute in stretching the technics to modify the harshness of the law, and should have occasionally given utterance to *dicta* praiseworthy in view of existing conditions, but unsound when applied to conditions such as now happily prevail. General rules enunciated under such circumstances, and based on such *dicta*, are not authority for the fundamental principles of the common law of this State. At most, they are general statements touching procedure, which must yield to the necessities of justice. The uncertainty of such rules was felt, and the principles to be followed in applying them were clearly stated by Sir Michael Foster as early as 1746: "Upon the whole, my opinion is that all general rules touching the administration of justice must be so understood as to be made consistent with the fundamental principles of justice, and consequently all cases where a strict adherence would clash with those fundamental principles are to be considered as so many exceptions to it." *Kinloch's case*, Fost. C. L., 16. (*State* v. *Lee*, 27 L. R. A., 499–500.)

The maxim that no one shall be twice put in jeopardy for the same offense is universal, and is based upon the principle found in all systems of jurisprudence, viz, the necessity for finality of judicial proceedings.

The principle of finality is an essential, but it is not more essential than the principle of justice. A *final* settlement is not more vital than a *right* settlement. The accused has a natural right to be exempt from a second trial after the first has been wholly concluded, but he has no right to determine what shall constitute a trial; this is determined by considerations of public policy in each jurisdiction and is not a fundamental principle found in any system of jurisprudence.

> It needs no argument to * * * demonstrate that the natural rights of the individual, as well as the interests of public order, are best served, and the essential principles of jurisprudence are most accurately followed, when the proceedings in a criminal prosecution include such protection against injustice that the final disposition of the cause will not only settle the controversy but settle it in accordance with law. Judicious legislation for securing a full, fair, legal trial of each criminal cause is not in derogation, but in protection of individual right, and is in full accord with the principle that no man shall twice be put in jeopardy for the same offense. That maxim, as we have seen, is based on the truth that a judicial proceeding lawfully carried on to

> its conclusion by a final judgment puts the seal of finality on the controversies determined by that judgment, and is not based on a theory that a person accused of crime has any natural right of exemption from those regulations of a judicial proceeding which the state deems necessary to make sure that the conduct and final result of that proceeding shall be in accordance with law. And so the "putting in jeopardy" means a jeopardy which is real, and has continued through every stage of one prosecution, as fixed by existing laws relating to procedure. (*State* v. *Lee*, 27 L. R. A., 499.)

If the accused has been erroneously acquitted by a trial court he has never been in real jeopardy. If there has been no vital error at *nisi prius*, an appeal from such a judgment of acquittal must needs be unsuccessful and the prisoner can not suffer thereby. If, on the other hand, the judgment is reversible, and the defendant is likely to be prejudiced by the appeal, it must necessarily be because of some error at first instance which made his trial abortive and made his jeopardy an apparent instead of a real one.

Justice Sawyer, in the case of *People* v. *Webb* (38 Cal., 230), takes a similar view:

> It is difficult to see how a party can claim to have been in jeopardy, within any reasonable signification of the terms employed in the Constitution, when the very evidence which would tend to put him in jeopardy has

> been, on his objection and demand, erroneously excluded by the court. The result is that a criminal may escape conviction by means of erroneous ruling excluding competent evidence, made at his request, and then avail himself of this acquittal, thus erroneously obtained through his own wrong, to defeat a further prosecution of the indictment.
>
> The same underlying principle of justice which demands a retrial because a juror is legally disqualified calls for a retrial when illegal evidence has been admitted or legal evidence excluded. In either case the trial is tainted, and should not support a valid final judgment. (*State* v. *Lee*, 27 L. R. A., 499.)

When the State sees proper to provide that the cause shall not necessarily be ended with the judgment of the trial court, but that further proceedings, on motion of the accused, may be had, an unjust verdict resumes its normal position of a legal nullity, and when the State provides for like proceedings on the motion of the prosecutor a similar result must follow.

The proposition was clearly stated in the case of *State* v. *Garvey* (42 Conn., 243), when the court said:

> The principle which protects an individual from the jeopardy involved in a second trial for the same offense is well established and fully recognized. The question, however, as to what constitutes a trial depends

> upon the course of procedure of the particular jurisdiction in which it is had, and the construction of the courts there with respect to it.

It is thus seen that a law permitting an appeal on the part of the State from a judgment of acquittal in the trial court and requiring the final verdict of the court to be reached in accordance with the settled principles of law and justice before it can support a valid judgment is not in derogation of any fundamental doctrine of the common law, or inconsistent with the principle found in all systems of jurisprudence, or of the Constitution, or in violation of any principle of original justice that supports and enforces the conclusiveness of a valid, final judgment.

Conclusion.

We submit, therefore, that it can not be held that the law of procedure now in force in the Philippine Islands which gives the government, as well as the accused, the right of appeal from judgments of acquittal of the courts of first instance in criminal cases (at the conclusion of which the jeopardy of the accused ends), is repealed by the general section of the Philippine government act of July 1, 1902, which provides that "no person shall for the same offense be twice put in jeopardy of punishment," because

First. The proceeding before the court of first instance and the supreme court of the Philippine Islands are but parts of a single, continuous trial.

Second. The Spanish law principle of jeopardy now in force in the Philippine Islands is identical with the common-law principle of jeopardy in force in the United States; the difference being one of application only.

Third. It must be held that Congress, in enacting this piece of special legislation, had in view the conditions and circumstances existing in the Philippine Islands and the laws in force there on the subject of criminal procedure, and that it legislated with special reference thereto.

Fourth. It has been the policy of the United States, in legislating for all of its insular possessions, and especially in providing a government for the Philippine Islands, to change as little as possible the private laws of the islands as they existed at the time of the change of sovereignty.

Fifth. Congress can not be presumed, by the use of general terms, to have engrafted on the Roman law system of trial by judges an application of the principle against double jeopardy which is connected inseparably with the common-law system of trial by jury. This could only be done by an express, specific provision repealing unmistakably the law of procedure in force in the islands at the date of the passage of the act.

Sixth. The adoption by Congress of the Spanish law application of the principle against double jeopardy is not in derogation of any fundamental right guaranteed by the Constitution of the United States, does not violate any principle of natural justice, and is not inconsistent with the universal principle of jurisprudence which enforces the conclusiveness of a final and valid judgment.

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